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No. 86-1838

In the Supreme Court of the United States

OCTOBER TERM, 1987

CAROLYN KING PALERMO, PETITIONER

v.

DEWAYNE REX, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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Petitioner contends that the district court erred in dismissing her suits seeking damages from federal officials for their involvement in allegedly unconstitutional and tortious personnel actions directed at her husband, a federal employee who was supervised by respondents.

1. Petitioner brought two separate damages actions against respondents, alleging that their actions contributed to the death of her husband, a former IRS employee. Petitioner filed one complaint in Louisiana state court, in the Civil District Court for the Parish of Orleans. She filed the other complaint in the United States District Court for the Eastern District of Louisiana. The state court action subsequently was removed to federal court and consolidated with the federal action. Pet. App. A3.

The gravamen of the complaints, which are virtually identical, is that respondents, who were Mr. Palermo's supervisors at the IRS,[1] wrongfully commenced discipli-

[1] DeWayne Rorex was the Chief, Collection Division, Jack Chivatero was a District Director, and Charles Hoyle was an Assistant District Director.

nary proceedings against him with the intention of inflicting mental and emotional distress. The complaints further alleged that these actions caused or contributed to Palermo's suicide on October 3, 1983. The state court action alleged that respondents' conduct was tortious; the federal court action alleged that respondents had violated Palermo's constitutional rights to due process and to be free from cruel and unusual punishment. Pet. App. A3-A4.

The particular allegations of the complaints were as follows: In February 1980, respondent Rorex told Palermo that he was being "rotated" to a different position within the IRS and that the "rotation" would last only 12 months. Palermo understood that at the end of that time period he would be permitted to return to his original position. However, Palermo was never "rotated" back to his previous position. Apparently as a result of the transfer and other job-related pressures, Palermo developed emotional and psychological problems, suffered a nervous breakdown, and was hospitalized. Pet. App. A4-A5.

The complaints further alleged: In April 1983, Rorex brought a disciplinary action against Palermo for conduct related to his breakdown. In that same month, Palermo again was hospitalized for his emotional problems. Subsequently, although respondents were advised by Palermo's psychiatrist of the seriousness of Palermo's mental illness, Rorex informed Palermo that disciplinary action would be taken against him if he attempted to return to work. On July 2, 1983, Palermo applied for disability retirement; that request was denied in August 1983. Palermo then returned to work, and in September 1983 respondents reinstated the disciplinary action against Palermo; they requested that Palermo be given a disciplinary downgrade and did not accede to his request to take a voluntary downgrade. Palermo committed suicide on October 3, 1983. Pet. App. A5.

2. The district court granted respondents' motion to dismiss the complaints. At the hearing on that motion, the court explained orally that it was dismissing the suits because "in this case * * * there is an exercise in the judgment of the employer/employee relationship * * * [and] I'm satisfied that the two cases [*Bush* v. *Lucas*, 462 U.S. 367 (1983), and *Gremillion* v. *Chivatero*, 749 F.2d 276 (5th Cir. 1985)] preclude the claim * * *." (II R. 7-8).

The court of appeals affirmed (Pet. App. A3-A17). Accepting arguendo the truth of the allegations of the complaints, the court held that petitioner had failed to state a claim for which relief could be granted. The court explained that in *Bush* v. *Lucas*, 462 U.S. 367 (1983), this Court had recognized that the special nature of the federal employer-employee relationship counselled against the creation of an additional constitutional remedy. The court concluded (Pet. App. A12): "In this highly regulated area of federal employment, where Congress has created exhaustive administrative avenues for employee disputes, there are those very strong 'special factors counselling hesitation' preventing us from creating a *Bivens*-type constitutional remedy for violations of employees['] constitutional rights arising in and from the employment context."[2]

Relying on *Barr* v. *Matteo*, 360 U.S. 564 (1959), the court of appeals rejected petitioner's state law tort claim. The court held that respondents were absolutely immune from liability for the common-law torts alleged in the state court complaint because all of the actions complained of in that suit came within the scope of respondents' employment as Palermo's supervisors. Pet. App. A13-A16. The

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[2] The court found that petitioner's Eighth Amendment claim was "patently frivolous," because the prohibition against cruel and unusual punishment "applies only in criminal actions, following a conviction" (Pet. App. A13).

court distinguished *Dretar* v. *Smith*, 752 F.2d 1015 (5th Cir. 1985), where the court of appeals had stated that absolute immunity was not available in a case where the defendant was charged with commiting a severe and maliciously-inspired physical battery. The court stated that to extend its statement regarding a physical battery to "less tangible intentional inflictions of emotional distresss" would "open the floodgates to actions by every public employee for emotional distress for every administrative action taken by a federal official[, which] would surely contradict the reasoning in *Barr* [v. *Matteo, supra*]" (Pet. App. A15).

3. Petitioner contends that the court of appeals erred in holding that *Bush* v. *Lucas, supra,* required rejection of her attempt to bring a nonstatutory suit for damages based on alleged constitutional violations. In *Bush*, this Court held that a federal employee could not bring such an action against his superiors based on the allegation that his dismissal was the product of unconstitutional conduct. The Court explained (462 U.S. at 368): "Because such claims arise out of an employment relationship that is governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States, * * * it would be inappropriate for us to supplement that regulatory scheme with a new judicial remedy." *Bush* controls this case.[3]

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[3] We note that, quite apart from the impact of *Bush*, it is clear that petitioner has not stated a claim for relief. Even if a nonstatutory damages action were available here in appropriate circumstances, it is not apparent that petitioner could bring such a suit to recover damages for alleged violations of her husband's constitutional rights. More importantly, it is plain that such a suit would have no chance of success in this case, even if all the allegations of petitioner's complaints are true. As the court of appeals noted, petitioner's Eighth Amendment claim is frivolous. And, because respondents are accused of doing no more than pursuing a disciplinary proceeding against Palermo through the normal procedural channels, it is difficult to see how they could have violated any due process rights of his, much less

Petitioner appears to recognize that *Bush* would be directly on point if Palermo were alive. The thrust of petitioner's contention, as we understand it, is that now that Palermo is dead, and can no longer pursue a reinstatement remedy, a constitutional suit for damages must be permitted (see Pet. 6-7). But his death does not alter the fact that Congress has prescribed procedures for remedying improper dismissals or demotions of federal employees, even if the claim is constitutionally based, and that this Court has determined that those remedies are not to be supplemented by a nonstatutory action for damages. The death of a federal employee cannot suddenly make appropriate the availability of such a damage suit, particularly when it is his own actions that have deprived him of administrative remedies made available by Congress. Here, as the court of appeals recognized (see Pet. App. A12-A13), petitioner's claim that Palermo's suicide was caused by respondents' allegedly unconstitutional personnel decisons seeks an element of damages for which Congress has not provided a remedy. But this Court in *Bush* specifically held that the fact that the administrative remedies Congress has provided do not allow complete recovery is not enough to warrant importing a nonstatutory remedy into the federal employment arena (see 462 U.S. at 372, 388), and that holding is dispositive here.[4]

4. Petitioner asserts (Pet. 9-10) that the Court should grant certiorari here to resolve a conflict in the circuits regarding the scope of *Barr* v. *Matteo, supra*. The decision below, however, does not even arguably conflict with any of the decisions cited by petitioner.

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have committed the violation of "clearly established * * * constitutional rights" that would have to be shown in order to overcome their qualified immunity. See, *e.g.*, *Mitchell* v. *Forsyth*, 472 U.S. 511, 524 (1985).

[4] To the extent Palermo's death was a result of his federal employment, petitioner may have a claim for benefits under the Federal Employees Compensation Act, 5 U.S.C. 8101 *et seq.* We understand that petitioner has filed such a claim, which is now pending before the

It is true that the Fifth Circuit stated on an earlier occasion (*Dretar* v. *Smith*, 752 F.2d at 1018), and reiterated here (Pet. App. A16), that it disagrees with the courts that have stated that there can never be an absolute immunity defense to an allegation of battery. Compare *Araujo* v. *Welch*, 742 F.2d 802 (3d Cir. 1984); *McKinney* v. *Whitfield*, 736 F.2d 766 (D.C. Cir. 1984). But that issue is not involved here, where there is no allegation that respondents committed a battery upon Palermo. Rather, the alleged tort is intentional infliction of emotional distress, which the court in *Araujo* specifically held to be subject to an absolute immunity defense (742 F.2d at 806). All of the cases relied upon by petitioner simply hold that the defendant's conduct in those cases, such as battery or sexual harassment, exceeded the "outer perimeter of [their] line of duty" (*Barr* v. *Matteo*, 360 U.S. at 575 (plurality opinion)). That clearly was not the case here, where the only allegations made against the respondents are that they transferred Palermo to a different job and commenced a disciplinary action against him within the proper procedural channels. In the words of the court of appeals, "[f]ew actions could be closer to the center of the scope of [respondents'] employment as supervisors, and [they] certainly do not begin to test the perimeters" (Pet. App. A16). There is no reason whatsoever to believe that any other court of appeals would have denied an absolute immunity defense for this conduct on the ground that it exceeded the "outer perimeter" of the scope of respondents' employment.[5]

Employees' Compensation Appeals Board of the Department of Labor (ECAB Docket No. 87-731; OWCP File No. A7-187400).

[5] Petitioner does not dispute that respondents were of sufficient rank in the federal hierarchy, and had sufficient responsibility, to be entitled, under *Barr* v. *Matteo*, *supra*, to invoke absolute immunity in appropriate circumstances. Nor, we submit, would petitioner have had a persuasive basis for claiming otherwise, in light of the considerable discretion that each of the respondents must exercise in the course of his duties. There is, accordingly, no need for the Court to

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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hold this case pending the decision in *Westfall* v. *Erwin*, cert. granted, No. 86-714 (Mar. 2, 1987), which involves the question of the type of employee that is entitled to the absolute immunity defense.

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